DePaul Law Review

Volume 26
Issue 1 *Fall 1976*

Article 3

Constitutional Safeguards for Juvenile Transfer Procedure: The Ten Years since Kent v. United States

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CONSTITUTIONAL SAFEGUARDS FOR JUVENILE TRANSFER PROCEDURE: THE TEN YEARS SINCE *KENT V. UNITED STATES*

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Kent v. United States *introduced due process safeguards into the procedure for transferring juveniles from the jurisdiction of the juvenile court to that of adult criminal court. In the ten years since* Kent, *courts, as well as legislatures, have sought to avoid the holding of* Kent. *In this Article, the author analyzes these attempted evasions of the* Kent *holding as well as the problems that have arisen due to the Court's failure to address the substantive requirements in waiving jurisdiction. The author concludes by challenging the judicial system to address itself to broader considerations of juvenile justice.*

I. INTRODUCTION

It has been ten years since the United States Supreme Court decided *Kent v. United States*,[1] the first case arising out of the juvenile justice system to be reviewed by the Court.[2] *Kent* held that where a state creates a juvenile court system, a minor cannot be transferred out of it without being afforded constitutional due process procedures: a hearing, access by counsel to reports considered by the juvenile court in making the transfer decision, and a statement of reasons for the juvenile court's decision to waive jurisdiction.[3] This latter requirement, when read in light of the juvenile court system's purpose, to provide treatment for juvenile offenders,[4] implies that while a juvenile remains amenable to

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1. 383 U.S. 541 (1966).

2. *See* Paulsen, *Kent v. United States: The Constitutional Context of Juvenile Cases*, 1966 SUP. CT. REV. 107 (1966). *See also* McKeiver v. Pennsylvania, 403 U.S. 528, 531-33 (1971). Two prior Supreme Court cases dealt with a juvenile's rights once the juvenile had been transferred to adult criminal court. *See* Gallegos v. Colorado, 370 U.S. 49 (1962); Haley v. Ohio, 332 U.S. 596 (1948).

3. 383 U.S. at 557.

4. *Id.* at 554-55:

> The theory of the District's Juvenile Court Act, like that of other jurisdictions, is rooted in social welfare philosophy rather than in the *corpus juris*. Its proceedings are designated as civil rather than criminal. The Juvenile Court is theoreti-

treatment the juvenile court cannot waive jurisdiction. Unfortunately, the Court did not delineate substantive criteria of amenability to treatment applicable to all jurisdictions.[5] Instead, the Court held that a jurisdiction must apply its statutory substantive criteria in determining whether to waive juvenile jurisdiction. Consequently, in the ten years following *Kent*, courts and legislatures have wrestled with the undefined concept of "amenable to treatment"[6] and often applied variable criteria.

II. THE HOLDING OF *Kent*

Morris A. Kent, Jr., while on probation under the jurisdiction of the juvenile court, was picked up as a suspect in a case of housebreaking and rape.[7] Without conducting the full investigation required by statute,[8] the juvenile court judge transferred Kent to the criminal jurisdiction of the district court.[9] After Kent was found guilty of housebreaking and innocent, by reason of insanity, of rape, he was ordered to serve his sentence as a psychiatric patient at St. Elizabeth's Hospital.

In reviewing Kent's appeal, the Supreme Court recognized that the disposition of minors within the juvenile court system is not constitutionally mandated.[10] The Court did hold that once a juvenile court system is authorized by statute, as Congress had done in the District of Columbia, a juvenile could not be transferred

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cally engaged in determining the needs of the child and of society rather than adjudicating criminal conduct. The objectives are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment. The State is *parens patriae* rather than prosecuting attorney and judge. (footnote omitted)

5. *See* Schornhorst, *The Waiver of Juvenile Court Jurisdiction: Kent Revisited*, 43 IND. L. J. 583 (1968). The author observed that *Kent* introduces procedural regularity, but fails to indicate substantive criteria. *Id.* at 602.

6. 383 U.S. at 542-43.

7. *Id.* at 543.

8. D.C. CODE §11-914 (1961). The relevant provisions of the statute are set forth at 383 U.S. at 547-48:

> If a child sixteen years of age or older is charged with an offense which would amount to a felony in the case of an adult, . . . the judge may, after full investigation, waive jurisdiction and order such child held for trial under the regular procedure of the court which would have jurisdiction of such offense if committed by an adult . . . .

9. 383 U.S. at 546.

10. *Id.* at 557.

to adult criminal court and withdrawn from the jurisdiction of the juvenile justice system without the benefit of procedures embodying certain due process safeguards.[11] The Court stated that there is no place in our system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons.[12]

By including the requirement of an accompanying statement of reasons as an integral part of the waiver procedure, the Court indicated concern that the juvenile court's decision be capable of being subjected to a meaningful appellate review.[13] Because the Court specifically declined the opportunity to review the merits of the juvenile court's decision to transfer Kent to the district court,[14] it did not articulate substantive standards to determine amenability to treatment.

However the Court did cite as the basis for the judge's statement of reasons, substantive elements of amenability to treatment provided by the District of Columbia statute.[15] Those factors are as follows:

> 1. The seriousness of the alleged offense to the community.
> 2. Whether the alleged offense was committed in an aggressive, violent, premeditated or willful manner.
> 3. Whether the offense was against persons or against property.
> 4. The merit of the complaint.
> 5. Where the codefendants are adults, the desirability of trying the entire action at one trial.

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11. *Id.* "We believe that this result is required by the statute read in the context of constitutional principles relating to due process and the assistance of counsel."

12. *Id.* at 554. The transfer of a juvenile has been called the "most severe sanction" that can be imposed on a juvenile. Schornhorst, *supra* note 5, at 586. In many jurisdictions, a finding of delinquency continues jurisdiction of the juvenile court over the child until he turns twenty-one, thereby strictly limiting the term of sentence. *See, e.g.*, D.C. CODE §11-1551 (Supp. IV, 1965); ALASKA STAT. §47.10.080 (c)(1) (commitment until offender's twentieth birthday); *cf.* N.J. REV. STAT. 2A: 4-37 (allowing juvenile courts to sentence beyond the offender's twenty-first birthday in some instances). If certified, however, the juvenile obviously faces the full range of possible adult punishment. *See, e.g.*, Ander v. Commonwealth, 465 S.W.2d 70 (Ky. 1971) (life imprisonment for 16 year old); Tucker v. State, 482 P.2d 939 (Okla. Crim. 1971) (20 years for a 14 year old).

13. 383 U.S. at 561.

14. *Id.* at 542-43.

15. *Id.* at 566-67.

6. The sophistication and maturity of the juvenile.
7. Previous contact with the juvenile court.
8. The likelihood of reasonable rehabilitation of the juvenile.[16]

Though not part of the *ratio decidendi* of the *Kent* holding, the District of Columbia statutory appendix standards have been adopted in subsequent judicial decisions[17] and in other state statutes enacted to conform with *Kent*.[18] The citation of the standards apparently represents the Court's sanction of the District of Columbia criteria of amenability to treatment. Application of these standards, however, is not without serious analytical problems.[19]

The majority[20] of the *Kent* appendix standards are easily applied. They are basically objective, readily calculated determinations. However, two of the criteria, likelihood of rehabilitation and sophistication, impliedly require the opinion of social scientists.[21] The area of greatest difficulty and interest is the elusive concept of likelihood of rehabilitation because of the magnitude of the consequences to the young offender of the decision to transfer him to criminal court. A basic premise of our juvenile court philosophy is that, whenever feasible, a child should be treated, not punished,[22] and that hope for rehabilitation, not demand for retribution, motivates the society's treatment of the child. The case law does not, however, inspire confidence that the ameliorative effect of *Kent* has been realized.[23]

16. *Id.*

17. *See, e.g.*, State v. Lemon, 110 Ariz. 568, 521 P.2d 1000 (1974); Kern v. State, 522 P.2d 644 (Okla. Crim. 1974); Mikulovsky v. State, 54 Wis. 2d 699, 196 N.W.2d 748 (1972).

18. The Pennsylvania Juvenile Act (Dec. 6, 1972), Pub. L. 1464, No. 333, §1 *et seq.*, 11 PA. STAT. 50-325(a).

19. *See* Schornhorst, *supra* note 5, at 28.

20. The factors are (1) the seriousness of the offense, (2) the aggressiveness of manner, (3) whether the offense was against persons, (4) the merit of the complaint, (5) the desirability of trying the juvenile with any adult codefendants, (6) former contact with the juvenile system.

21. *See* notes 104-06 and accompanying text *infra*.

22. *See* In re Gault, 387 U.S. 1 (1967); TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME (1967); Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909). *But see* Fox, *Juvenile Justice Reform: An Historical Perspective*, 22 STAN. L. REV. 1187 (1970).

III. AREAS OF NONAPPLICATION OF THE *Kent* HOLDING

Some courts have accepted several arguments that limit *Kent's* application. One ground frequently cited, prior to the Supreme Court's opinion in *In re Gault*,[24] was that *Kent* applied only in the District of Columbia because the procedural rights announced were derived solely from an interpretation of the District of Columbia Code.[25] The argument that *Kent* was limited to the District of Columbia was resolved in *Gault* in which the Court held that although the decision in *Kent* relied on the language of the statute, the basic requirements of due process and fairness must be satisfied in all waivers of juvenile court jurisdiction.[26] Therefore, even though *Kent* does not mandate a state to create a juvenile court or prevent a waiver to be effected by means other than a judicial hearing, once a jurisdiction does create such a

23. There is serious question whether the high hopes for the juvenile justice system have ever been fulfilled. *See In re* Gault, 387 U.S. 1 (1967); Kent v. United States, 383 U.S. at 556. "[T]here may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults nor solicitous care and regenerative treatment postulated for children;" TASK FORCE REPORT, *supra* note 22. "Studies by the Commission, legislative inquiries in various States, and reports by informed observers compel the conclusion that the great hopes originally held for the juvenile court have not been fulfilled." *Id.* at 7.

24. 387 U.S. 1 (1967). *Gault* held that Fourteenth Amendment due process mandates that in juvenile court proceedings, as a result of which a juvenile may be committed to an institution, the child and the child's parents or guardian must be (1) given notice sufficient to permit a defense to the charges; (2) notified of the right to counsel, including the right to court appointed counsel; and (3) advised the child is entitled to the Fifth Amendment self-incrimination privilege and the Sixth Amendment rights to confrontation and cross-examination.

25. A Maryland statement is typical that *Kent* "dealt solely with, and was expressly limited to, the interpretation to be given to" the Juvenile Court Act of the District of Columbia. Hazell v. State, 12 Md.App. 144, 151, 277 A.2d 639, 642 (1971); *accord*, Stanley v. Peyton, 292 F. Supp. 209 (W.D. Va. 1968); Holmes v. State, 224 Ga. 553, 163 S.E.2d 807 (1968); People v. Sprinkle, 4 Ill.App.3d 6, 280 N.E.2d 29 (1972); Hammer v. State, 3 Md.App. 96, 238 A.2d 567 (1968); Commonwealth v. A Juvenile, 363 Mass. 640, 296 N.E.2d 194 (1973); Lujan v. District Court, 161 Mont. 287, 505 P.2d 896 (1973); Neller v. State, 79 N.M. 528, 445 P.2d 949 (1968); State v. Acuna, 78 N.M. 119, 428 P.2d 658 (1967); *In re* Bullard, 22 N.C.App. 245, 206 S.E.2d 305 (1974); State v. Johnson, 5 N.C.App. 469, 168 S.E.2d 711 (1969); Runge v. State, 86 S.D. 9, 190 N.W.2d 381 (1971); Cradle v. Peyton, 208 Va. 243, 156 S.E.2d 874 (1967); Mullin v. State, 505 P.2d 305 (Wyo. 1973). *Contra*, United States *ex rel.* Turner v. Rundle, 438 F.2d 839, 842 n.11 (3d Cir. 1971) which gives exhaustive collection of authority.

26. 387 U.S. at 12. *See also* Schornhorst, *supra* note 5, at 602: "After a careful reading of *Kent* and *Gault*, a question as to the constitutional status of the holdings in the former case would seem pure rhetoric."

procedure, due process must be followed.[27]

A second method employed to avoid following the rationale of *Kent* is to argue that its holding should apply prospectively only. As a result, the requirements of a statement of reasons to waive jurisdiction and the right to counsel generally have not been extended to juveniles incarcerated before *Kent*.[28] In refusing to apply *Kent* retroactively, courts have emphasized that the hearing is not a finding of guilt or innocence,[29] and that the subsequent trial is an adequate guarantee that the fact finding process was not impaired.[30]

However, this line of reasoning was rejected in *Kemplen v. Maryland*.[31] This case suggests that *Gault* and *Kent* when read together require that due process, including appointment of counsel, be afforded the juvenile at every stage which affects his substantial rights.[32] The court found that the "waiver hearing is much more than a mere 'preliminary hearing establishing probable cause.' "[33] While innocence is not decided in the waiver proceeding, the question of fitness for rehabilitation is not relitigated at trial. Therefore, improper waiver or failure to provide a meaningful hearing, followed by a criminal conviction, permanently deprives the offender of facilities open to other juveniles.

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27. 383 U.S. at 562.

28. *See* Harris v. Procunier, 498 F.2d 576 (9th Cir.), *cert. denied*, 419 U.S. 970 (1974); Mordecai v. United States, 421 F.2d 1133 (D.C. Cir.) (Bazelon, C.J.), *cert. denied*, 397 U.S. 977 (1969); United States v. Wilkerson, 262 F. Supp. 596 (D.D.C. 1967); *In re* Harris, 67 Cal.2d 876, 434 P.2d 615, 64 Cal. Rptr. 319 (1967); Fields v. Commonwealth, 498 S.W. 2d 130 (Ky. 1974); Bailey v. Commonwealth, 468 S.W.2d 304 (Ky. 1971); Smith v. Commonwealth, 412 S.W.2d 256 (Ky. 1967); Hammer v. State, 3 Md.App.96, 238 A.2d 567 (1968); Powell v. Sheriff, 85 Nev. 684, 462 P.2d 756 (1969); State v. Fair, 263 Ore. 383, 502 P.2d 1150 (1972); Bouge v. Reed, 254 Ore. 418, 459 P.2d 869 (1969); Commonwealth v. James, 440 Pa. 205, 269 A.2d 898 (1970); Cradle v. Peyton, 208 Va. 243, 156 S.E.2d 874 (1967).

29. *See, e.g.*, Commonwealth v. James, 440 Pa. 205, 269 A.2d 898 (1970).

30. *See, e.g.*, T.K. v. State, 126 Ga.App. 269, 190 S.E.2d 592 (1972); Powell v. Sheriff, 85 Nev. 684, 462 P.2d 756 (1969).

31. 428 F.2d 169 (4th Cir. 1970). *See also* Haziel v. United States, 404 F.2d 1275 (D.C. Cir. 1968); James v. Cox, 323 F. Supp. 15 (E.D. Va. 1971).

32. 428 F.2d at 173, *citing* Mempa v. Rhay, 389 U.S. 128 (1967).

33. 428 F.2d at 173.

> [P]resence of counsel at the waiver hearing is essential to the fairness of that process . . . . There is a very real danger in any waiver proceeding that, without the presence of counsel for the accused, juvenile jurisdiction will be waived on the basis of unreliable or untrue information.

Id.

Courts have hesitated to extend retroactively the rights afforded by *Kent* to petitioners who are now adults, in part because of the difficulty of framing an adequate remedy for "geriatric juveniles."[34] If on remand, the court finds that waiver was improper, it is no longer possible to treat the now adult offender in a juvenile facility. Release, therefore, is thought to be the only alternative.[35] But release is a poor substitute for the now unavailable chance of rehabilitation, especially from society's point of view.

This position, however, is overstated. Theoretically, at least, an offender who originally was amenable to treatment but did not receive it should still be in need of treatment. If that is the case, and the offender poses a threat to society or himself, then the offender is a fit subject for civil commitment under the ordinary civil commitment statute.[36] If the offender was originally amenable to treatment, but is somehow rehabilitated and no longer in need of treatment after serving time in prison, then society has no further interest in detaining him.[37]

Another rationale to avoid the *Kent* decision is that a guilty plea waives due process infirmities in the juvenile hearing procedure. Transfers which were invalid because counsel was denied[38]

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34. *Id.* at 178. *Cf.* Kent v. United States, 383 U.S. 541.

> Ordinarily we would reverse the Court of Appeals and direct the District Court to remand the case to the Juvenile Court for a new determination of waiver . . . . However, petitioner has now passed the age of 21 and the Juvenile Court can no longer exercise jurisdiction over him . . . .

Id. at 564.

35. 428 F.2d 169 (4th Cir. 1970).

36. Kent v. United States, 401 F.2d 408, 409-12 (D.C. Cir. 1968).

37. This problem was addressed by the District of Columbia Court of Appeals in Kent v. United States, *id.* At the time the case was on remand, Kent was no longer a juvenile. He argued that the juvenile court should have taken steps towards civil commitment in Saint Elizabeth's Hospital. *Id.* at 409. The court of appeals agreed and concluded that because the waiver of 1961 was improper, the criminal proceedings against Kent were invalid and had to be vacated. The court noted, however, that the government still could institute civil commitment proceedings against Kent to insure that he remained in the hospital for as long as public safety required. *Id.* at 412.

38. *See, e.g.*, Jackson v. Johnson, 364 F.2d 233 (6th Cir. 1966); Eyman v. Superior Court, 9 Ariz.App. 6, 448 P.2d 878 (1968); State v. Salazar, 79 N.M. 592, 446 P.2d 644 (1968); State v. Johnson, 5 N.C.App. 469, 168 S.E.2d 711 (1969); Crumley v. State, 3 Tenn. Crim. 385, 462 S.W.2d 252 (1970). *Contra*, Powell v. Hocker, 453 F.2d 652 (9th Cir. 1971); Dillenburg v. Maxwell, 68 Wash.2d 481, 413 P.2d 940 (1966).

or no statement of reasons was supplied[39] have been upheld when the defendant pleaded guilty subsequent to the transfer. A guilty plea is relevant only to criminal liability. It cannot be construed as an admission that the offender is not amenable to treatment. In addition, improper waiver prevents the offender from being sentenced by the juvenile court and, thus, theoretically results in an illegal sentence, a basis for relief traditionally not waived by a guilty plea.[40]

IV. AMENABILITY TO TREATMENT: A MEANINGFUL STANDARD?

Although *Kent* has risen above some courts' efforts to limit it to the District of Columbia statute or prospective decisions, the question still remains whether *Kent's* "amenability to treatment" standard is meaningful in waiver decisions. By requiring a statement of reasons before a waiver can be entered, the Court forces the juvenile court judge to state substantive reasons why the minor is not amenable to treatment. An empirical study conducted in 1969[41] indicates, however, the wide variety and often questionable criteria employed by juvenile judges in setting forth the substantive elements of amenability to treatment. For example, over 25% of the responding judges considered as highly important the economy of a single trial with adult codefendants,[42] while 17% admitted that they were influenced by public feelings and the demand for retribution.[43] Moreover, as indicative of the failure of the present system, judges reported no consistent opinion as to the percentage of juveniles appearing before them who were capable of rehabilitation[44] and admitted that waivers sometimes were granted simply because juvenile institutions were

39. *See, e.g.*, Smith v. Cady, 452 F.2d 141 (7th Cir. 1971); Neller v. State, 79 N.M. 528, 445 P.2d 949 (1969).

40. *See, e.g.*, Commonwealth *ex rel.* Sanders v. Maroney, 417 Pa. 380, 207 A.2d 789 (1965).

41. Comment, *Waiver of Jurisdiction in Juvenile Courts*, 30 OHIO ST. L.J. 132 (1969). The author of the Comment analyzed questionaires answered by 50 of 95 Ohio juvenile court judges to whom it was sent. The study is undoubtedly limited both in its numerical sample and in its geographical location. It is, however, consistent with cases analyzed in this Article that suggest that questionable criteria often motivate the transfer decision.

42. *Id.* at 137.

43. *Id.* at 138.

44. *Id.* The percentages varied from 60 to 99%.

overcrowded rather than because the offender was untreatable.[45]

Given these arbitrary decisions, it is questionable whether "amenability to treatment" or the related "best interest" standard used by some states is sufficiently self-defining to provide the juvenile courts with adequate guidelines. The issue of whether transfer criteria provide objective standards to guide the juvenile court judge has recently received considerable attention. In *People v. Fields*,[46] the Michigan Supreme Court characterized its state's "best interest" test[47] as "subject to so many possible interpretations as to be no standard at all."[48] Shortly after the decision in *Fields*, the Michigan court system adopted a court rule that included criteria that paralleled those provided in the *Kent* appendix. Subsequently, in *In re Jackson*,[49] the court held that a waiver pursuant to the rule was proper because "amenable to treatment" when read with the *Kent* appendix criteria is sufficiently precise to meet constitutional muster.[50]

Several jurisdictions, however, have held that the "best interest" standard does conform with due process.[51] For instance, in *Clemons v. State*,[52] the Indiana court held that the "best interest" standard offered sufficiently precise guidelines, especially when prior case law, including *Kent*, was incorporated into the statutory provision.[53] Similarly, in *In re F.R.W.*,[54] the Wisconsin Supreme Court cited Wisconsin precedent for the incorporation of the *Kent* criteria into its statutory "best interest" standard.[55] Further, the court emphasized the imprecision inherent in the concept of the child's best interest as a justification for not requir-

45. *Id.* at 138-39.

46. 388 Mich. 66, 199 N.W.2d 217 (1972).

47. MICH. C.L.A. §712A.1; M.S.A. §27.3178 (598.1) (1973).

48. *Id.*, *cited* at 388 Mich. at 73, 199 N.W.2d at 220.

49. 46 Mich.App. 764, 208 N.W.2d 526 (1973).

50. *Id.* at 769, 208 N.W.2d at 529-30.

51. *See, e.g.*, Comment, *Delegation of Legislative Power to Judiciary*, 1973 WIS. L. REV. 259 (1973); Clemons v. State, 317 N.E.2d 859 (Ind. App. 1974); *In re* Juvenile, 306 N.E.2d 822 (Mass. 1974); Sherfield v. State, 511 P.2d 598 (Okla. 1973); *In re* Bullard, 22 N.C.App. 245, 206 S.E.2d 305 (1974); *In re* Salas, 520 P.2d 874 (Utah 1974); *In re* F.R.W., 61 Wis.2d 193, 212 N.W.2d 130 (1973). *See also* State v. Owens, 197 Kan. 212, 416 P.2d 259 (1966); State v. Doyal, 59 N.M. 454, 286 P.2d 306 (1955).

52. 317 N.E.2d 859 (Ind. App. 1974).

53. *Id.* at 863.

54. 61 Wis.2d 193, 212 N.W.2d 130 (1973).

55. *Id.* at 205, 212 N.W.2d at 136.

ing more stringent standards. An Oklahoma court also adopted this view and held that even though the state's statute was vague on its face, when supplemented by *Kent*, the statute did not violate due process.[56]

Thus, courts are almost unanimous that the "best interest" standard, an even less precise standard than "amenability to treatment," provides meaningful guidelines for the juvenile court judge, especially when *Kent* criteria are considered. Therefore, analysis of the case law should offer insight into whether the *Kent* criteria are in fact employed by transferring courts.

V. Amenability To Treatment: Specific Criteria

Requiring the juvenile court judge to include a statement of reasons in a waiver of juvenile court jurisdiction indicates the desire of the Court to provide some uniformity in the review of such waivers. The failure of the Supreme Court in *Kent*, however, to define the substantive requirements of such a statement has led lower courts to rely on some *Kent* criteria to the exclusion of others[57] or to use non-*Kent* considerations in determining amenability to treatment.[58] Consequently, the goal of uniformity has not been reached and the minor's right to treatment is not being adequately protected. The following discussion isolates some of the criteria employed by various juvenile judges in determining if a juvenile is amenable to treatment.

Perhaps the most detailed treatment of the waiver problem appears in *Mikulovsky v. State*.[59] There, the juvenile court waived jurisdiction over a seventeen-year-old who murdered both his parents. The court based its decision primarily on the testimony of the investigating detective, but applied the eight *Kent* appendix criteria.

The *Mikulovsky* court emphasized the seriousness of the offense[60] as the decisive factor in the transfer decision. Obviously, other *Kent* criteria such as whether the offense was committed

56. Sherfield v. State, 511 P.2d 598, 602 (Okla. 1973).

57. *See* notes 59-75 and accompanying text *infra*.

58. *See* notes 76-97 and accompanying text *infra*.

59. 54 Wis.2d 699, 196 N.W.2d 748 (1972).

60. *Id.* at 706, 196 N.W.2d at 752, where the judge cited "the lack of remorse, which is evident by this heinous crime, has shocked this Court to its roots."

against persons or against property amount to little more than that the crime was of a serious nature. The *Mikulovsky* court, however, went beyond this and concluded that sophistication and likelihood of treatment were directly related to the heinousness of the juvenile's action.[61] Yet, it does not seem that the heinousness of an offense is sufficient to certify a juvenile to adult court unless the offense is one for which the legislature has provided for automatic certification.[62] Further, in light of the juvenile court philosophy in favor of retaining jurisdiction over treatable children,[63] an offender such as Mikulovsky may be capable of rehabilitation despite the seriousness of the offense. The *Mikulovsky* court did not consider psychological or psychiatric testimony that might have indicated whether the juvenile was a likely recidivist.[64] The prior record of the juvenile, while seemingly of value in determining amenability to treatment, was rejected as irrelevant by the *Mikulovsky* court.[65] The juvenile, in fact, had no previous record.[66] Thus, the court rejected one indication that the murder was unique in the juvenile's life, and an act unlikely to be repeated. The defendant's lack of a prior record failed to be an important factor in the waiver decision.

The reviewing court rejected the need for such analysis when the seriousness of the offense and the surrounding circumstances outweighed the absence of prior offenses.[67] Thus viewed, the

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61. *Id.* at 705-06, 196 N.W.2d at 751-52.

62. *See* notes 147-157 and accompanying text *infra*.

63. *See In re* Whittington, 17 Ohio App.2d 164, 245 N.E.2d 364 (1969); Comment, *supra* note 41, at 624:

> Emphasizing that the juvenile system was established to rehabilitate the youthful offender, the court [in *In re Whittington*] determined that jurisdiction could not be relinquished unless the juvenile court found, on sufficient evidence, that the youth could not be rehabilitated within the facilities available to the juvenile system . . . .

64. 54 Wis.2d at 707, 196 N.W.2d at 752-53. *Cf.* State v. Gibbs, 94 Ida. 908, 916-17, 500 P.2d 209, 217 (1972), in which the court condemns the failure to make inquiry into mental and emotional development of the child and states:

> [t]he nature of the alleged and past offenses is relevant to the question of the defendant's present state of development, but standing alone, it fails to establish sufficient grounds for waiving jurisdiction. A valid waiver must be based on a specific finding . . . that the defendant is not amenable to rehabilitative treatment . . . .

65. *Id.* at 705-06, 196 N.W.2d at 752.

66. *Id. See also* State v. Jump, 309 N.E.2d 148 (Ind. App. 1974).

67. *Id.* at 708, 196 N.W.2d at 753.

court's finding of nonamenability to treatment amounts to little more than a finding that the juvenile was nearing his majority and that the offense was serious.[68]

The remaining criteria of *Kent* not only seem to be of less importance to the court's analysis than the seriousness of the offense, but also have no bearing on whether the juvenile is amenable to treatment. That a complaint has merit appears to be irrelevant to the issue of fair treatment of the juvenile. Also, the desirability of a single trial with adult codefendants is unrelated to a determination whether a juvenile can be treated successfully in a juvenile facility[69] and in addition can be criticized by two due process arguments.[70]

Prior Contact with the Juvenile Court System

Conversely, if a defendant has a prior record, his former contact with the juvenile correctional services is frequently cited to his disadvantage as a factor in transferring him to adult criminal court.[71] For example, in *In re Anonymous*[72] the Arizona Appellate

68. *Cf.* P.H. v. State, 504 P.2d 837 (Alas. 1972), which comes to the same result, but does so explicitly.

69. Joinder no doubt is often a tool of efficient administration of justice. However, apart from efficiency, it is unclear why participation in crime with an adult is relevant. Arguably, a juvenile who conspires with an adult may be more sophisticated than one who conspires with his peers. Sophistication, however, is a distinct criterion under the *Kent* criteria.

70. First, prior to *In re* Winship, 397 U.S. 358 (1970), prosecutors may have been motivated to try a weak case before a juvenile court which would apply a lesser standard of proof than did criminal courts. Second, certifying a juvenile in order to join him with an adult offender is indefensible in light of due process. *See* note 69 *supra*.

71. *See, e.g., In re* Burtts, 12 Wash.App. 564, 530 P.2d 209 (1975); State v. Lemon, 110 Ariz. 568, 521 P.2d 1000 (1974); *In re* Salas, 520 P.2d 874 (Utah 1974); State v. Thompson, 502 S.W.2d 359 (Mo. 1973); Madrigal v. State, 85 N.M. 496, 513 P.2d 1278 (1973); Sherfield v. State, 511 P.2d 598 (Okla. 1973); State *ex rel.* Juvenile Dep't v. Johnson, 501 P.2d 1011 (Ore.App. 1972). *But cf.* the Supreme Court's decision in Kent v. United States, 383 U.S. 541 (1966). In some instances, absence of prior contact with the juvenile authorities is viewed as irrelevant where sufficient other grounds for waiver exist. *See, e.g.*, Mikulovsky v. State, 54 Wis.2d 699, 705-06, 196 N.W.2d 748, 752 (1972); Kern v. State, 522 P.2d 644, 648 (Okla.Crim. 1974) ("[A]lthough he has little or no prior record with juvenile authorities he is presently on a two-year deferred sentence from the Criminal Division of the District Court as an adult"). A novel approach was suggested by the defendant in People v. Allgood, 54 Cal. App. 3d 434, 444, 126 Cal. Rptr. 666, 673 (1976), but rejected by the court:

> defendant argues that since society has no complete or definitive knowledge of how to treat law violators successfully, or how to predict future behavior, it is

Court affirmed the lower court's transfer of a juvenile offender who had a history of contacts with the juvenile system. The court cited the psychiatric evaluation that appeared on record, and concluded that unless there was some appreciable behavior modification, the juvenile would likely continue acting in a deviant manner.[73]

The psychiatric evaluation underscores the dilemma that courts must face. The child's illness and need for treatment is glaring. At the same time, the report indicates the hopelessness of the situation. No one can pretend any longer that further treatment in existing facilities is likely to help. It is rational to infer that failure in the past is strong evidence of failure in the future. Thus, the Arizona court concluded:

> There comes a time when a minor's welcome in Juvenile Court is worn out and he must understand that if he continually refuses to be receptive to treatment under the juvenile system and continues to be an irresponsible person, the only alternative left for the Juvenile Court is to transfer him to the adult court for criminal prosecution.[74]

Despite the logical relationship between prior contact with the juvenile system and nonamenability to treatment, one must consider the nature of the prior contacts. For example, some children who need the services of remedial institutions but cannot get in because of overcrowding are placed in foster homes under the theory that any home at all is better than the miserable homes in which they were raised. The trouble with this practice is that, in general, such foster home placements are not supervised adequately and the children cannot be helped sufficiently with their problems. Therefore, past treatment failures may not indicate that a particular juvenile is not amenable to treatment.[75]

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irrational to find a person unamenable to treatment until that treatment is attempted. Under that theory no first offender could be referred to the general criminal court.

72. 14 Ariz.App. 466, 484 P.2d 235 (1971).

73. *Id.* at 475, 484 P.2d at 242.

74. *Id.* at 475, 484 P.2d at 243-44.

75. *See* TASK FORCE REPORT, *supra* note 22, on the failure of resources committed to the juvenile justice system.

*Non-*Kent *Factors Utilized by Courts in Waiver Determinations*

Courts also have based waiver decisions on such factors as availability of treatment,[76] its cost,[77] and emancipation.[78] There is much to be said for weighing the availability of proper treatment facilities in making the waiver decision.[79] A court ought not incarcerate easily treatable juveniles or petty offenders with juveniles who have more serious sociopathic problems.[80] Certainly, it is relevant to the protection of the community as a whole whether a juvenile can be treated within existing facilities.[81]

Such a position, however, can have ironic results. For example, in *P. H. v. State*,[82] where a juvenile had committed kidnap and a number of lesbian acts, the court found an "obvious need for treatment."[83] The lack of psychological and rehabilitation services, often cited as the bailiwick of the juvenile justice system,[84] was a primary factor in waiving jurisdiction.[85] In *In re Blakes*,[86] where a juvenile was charged with stealing a bag of potato chips, the juvenile court jurisdiction was waived due to a lack of facilities to place the juvenile in the state and a cost in excess of $950.00 per month for putting the juvenile in another state's facilities.

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76. *See, e.g.*, State *ex rel.* Juvenile Dep't v. Johnson, 501 P.2d 1011 (Ore. App. 1972). "A court in all juvenile dispositional matters not only may, but must, give careful consideration to availability of such resources." *Id.* at 1013. *See also* P.H. v. State, 504 P.2d 837 (Alas. 1972); *In re* Blakes, 4 Ill.App.3d 567, 281 N.E.2d 454 (1972); Welfare of J.E.C. v. State, 225 N.W.2d 245 (Minn. 1975).

77. *See, e.g., In re* Blakes, 4 Ill.App.3d 567, 281 N.E.2d 454 (1972).

78. *See, e.g., In re* Pima County, 20 Ariz.App. 10, 509 P.2d 1047 (1973). *See also In re* Welfare of Hernandez, 15 Wash. App. 205, 548 P.2d 340 (1976).

79. Although some observers of the juvenile justice system have expressed doubts as to the success of the treatment in that system, *supra* note 22, there is some evidence of reasonable success in some specific programs. *See* Comment, *Juvenile Justice in Transition*, 14 U.C.L.A. L. REV. 1144, 1150-51 (1967).

80. *See* State v. Lemon, 110 Ariz. 568, 521 P.2d 1000 (1974).

81. *See In re* Salas, 520 P.2d 874 (Utah 1974).

82. 504 P.2d 837 (Alas. 1972).

83. *Id.* at 846.

84. *See, e.g., In re* Gault, 387 U.S. 1, 15-17 (1967).

85. *See* notes 37-40 and accompanying text *supra*. If the basis for the court's decision is the shortness of the time before the juvenile court loses jurisdiction over the juvenile, civil commitment procedures may guarantee society's safety and the child's need for treatment.

86. 4 Ill.App.3d 567, 281 N.E.2d 454 (1972).

Welfare of J. E. C. v. State[87] represents the opposite extreme in the analysis of existing facilities. The trial court waived jurisdiction of a seventeen-year-old charged with aggravated battery due to a seven year history of offenses and a psychologist report that existing facilities were ill-suited for hard-core, sophisticated, aggressive delinquents.[88] While sympathizing with the juvenile court, the Minnesota Supreme Court reversed the transfer stating that "the absence of rehabilitation facilities to treat appellant *may not mean* he is not amenable to treatment."[89] The court's finding was grounded on a premise that a juvenile has a right to rehabilitative treatment and that no legal justification existed to deny treatment to an eligible offender.[90]

The holding of the Minnesota court is unassailable if one views the problem of juvenile rehabilitation as a failure of resources.[91] In turn, a court's willingness to retain jurisdiction may be related to its view of the likelihood of successful treatment in the juvenile system at all.[92] If a court views the purpose of juvenile justice as unrealistic, it is likely to overvalue the interest of society in mak-

87. 225 N.W.2d 245 (Minn. 1975).

88. *Id.* at 247.

89. *Id.* at 249 (emphasis added).

90. *Cf.* Haziel v. United States, 404 F.2d 1275 (D.C. Cir. 1968) (opinion by Bazelon, C.J.):

> Since the presumption of the statutory framework is that juveniles are to be treated as juveniles the "full investigation" required before waiver to adult court must explore all the possible dispositions short of waiver by which the "welfare of the child and the best interests of the District" . . . may be secured . . . . It is the duty of the judge to insure that the child receives the full benefits promised by the statutory scheme . . . .
>
> [T]he statute commands such an examination of alternatives. Perhaps it is only by searching for what we need but do not have that future improvements in knowledge and resources can be hoped for. Whether such hope is justified or not, a "full investigation" is commanded, and it cannot be mere ritual.

On the issue of right to treatment once an individual is in an institution, *id.* at 1279-80. *See also* O'Connor v. Donaldson, 422 U.S. 563 (1975).

91. There is ample support for such a position. *See* TASK FORCE REPORT, *supra* note 22, at 7-8, suggesting that juvenile judges often lack adequate training and that caseloads prevent even the best trained juvenile personnel from doing an adequate job. *See also* McCune & Skoler, *Juvenile Court Judges in the United States*, 11 CRIME & DELINQUENCY 121 (1965); CALIFORNIA GOVERNOR'S SPECIAL STUDY COMMISSION ON JUVENILE JUSTICE IN CALIFORNIA (1960). "Based upon estimates furnished by the juvenile court judges, the average time spent on a juvenile court case is approximately 10 to 15 minutes . . . ." *Id.* at 16.

92. *See* notes 41-45 and accompanying text *supra*.

ing its waiver decision. Interestingly, however, none of the cited cases have addressed the available statistical data concerning juvenile recidivism and rehabilitation.[93]

Finally, select cases point to the additional factor of emancipation, not cited in the *Kent* examination of amenability to treatment. *In re Pima County*[94] dealt with a case unique on its facts: the juvenile offender, seventeen-years- and eleven-months-old, already a member of the United States Marine Corps, committed a particularly violent assault.[95] The court relied on two factors in addition to criteria discussed above. First, the juvenile had attained the status of an emancipated minor and therefore was solely responsible for his actions. Second, the rehabilitation of juveniles, generally attempted through use of the family unit, was impractical because of his emancipated state and because his family resided out of the jurisdiction.[96] One would not expect many other juveniles to be emancipated in the sense that the juvenile was in the instant case. The importance of the family, however, has received no consideration elsewhere as a basis for retaining jurisdiction in the juvenile court despite its relevance to rehabilitation.[97]

Summary of Determinative Factors

Based on the case law, a juvenile is most likely to be transferred if he is close to his eighteenth birthday, has committed a relatively serious offense, and is a recidivist.[98] Another frequently

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93. *See In re* Maricopa County, 18 Ariz.App. 560, 504 P.2d 501 (1972).

> Admittedly, the court, in order to adequately inform itself as to all aspects of the behavioral sciences as they specifically apply to a juvenile, should consider and be receptive to experts in this field. However, when we consider the nature of this testimony, the attempt to predict human behavior in a particular individual over a definite period of time, the juvenile court should not be limited solely to such opinion evidence. Rather, the juvenile judge should also properly consider the particular juvenile's track record in the past and his amenability to the juvenile processes that this record discloses.

Id. at 504-05.

94. 20 Ariz.App. 10, 509 P.2d 1047 (1973).

95. *Id.* at 12, 509 P.2d at 1049.

96. *Id.*

97. *See generally* Rodman & Grams, *Juvenile Delinquency and the Family: A Review and Discussion*, in TASK FORCE REPORT: JUVENILE DELINQUENCY AND YOUTH CRIME 188-221 (1967). *See also* People v. Allgood, 54 Cal. App. 3d 434, 126 Cal. Rptr. 666 (1976).

98. Age and seriousness of the offense are separate criteria under the *Kent* appendix

cited basis for transfer is the absence of suitable juvenile facilities.[99] Upon closer examination, however, that criterion may merely restate the facts that a juvenile is close to his majority and has committed a serious crime.

While age and seriousness of the offense are obviously relevant to a court's disposition of a juvenile offender, their importance can easily be overstated; if a juvenile is treatable but close to the age when the juvenile court will lose jurisdiction over him, he may be subject to civil commitment.[100] Commitment protects the community interest by segregating the offender from the rest of society and also preserves the ideal of the juvenile system that an offender should be treated rather than punished.

Further, it is not clear whether a juvenile who commits a serious offense is *ipso facto* less amenable to treatment than one who commits a trivial offense. In general, courts have glossed over that possibility and pointed to the seriousness of the offense as indicative of nonamenability.[101] The problem appears to be far more complex than courts have recognized. For example, one study indicated that juvenile murderers are model prisoners and low rate recidivists.[102] There is also an indication that juvenile offenders can be categorized not by seriousness of the offense but by the motivational need that the crime fills.[103] A corollary of such a theory is that one cannot infer capacity for treatment from the nature of the offense.

The determination of who is amenable to treatment is at best elusive. It involves subtle predictive judgments not ordinarily within the expertise of appellate courts. At the same time, it is unlikely that any court would be willing to defer entirely to expert opinion.[104]

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standards; nonetheless, they are often discussed as relevant indicia of a juvenile's amenability to treatment. *See, e.g.*, P.H. v. State, 504 P.2d 837 (Alas. 1972).

99. *See* notes 76-93 and accompanying text *supra*.

100. *See* notes 36 & 37 and accompanying text *supra*.

101. *See, e.g.*, Mikulovsky v. State, 54 Wis.2d 699, 196 N.W.2d 748 (1972). *But see* Kent v. United States, 383 U.S. 54 (1966), where the Supreme Court had before it an extremely serious record of past offenses. Nonetheless, the Supreme Court remanded for a finding on the question of amenability of treatment.

102. C.H. GROWDEN, A GROUP STUDY OF JUVENILE HOMICIDE (1949), *cited* in Sargent & Gordon, 9 CRIME & DELINQUENCY 121 (1963).

103. *See* Rodman & Grams, *supra* note 97; SCHAFER & KNUDTEN, JUVENILE DELINQUENCY: AN INTRODUCTION (1970).

104. One must remember that a large part of a court's function is the protection of

This Article is not intended to offer a sociological model for juvenile crime that might be applied in our courts. It is worth noting, however, the apparent lack of clinical evaluation that has gone into judicial determination of a juvenile's "amenability to treatment." It does not suffice to say that "amenability to treatment" is a legal rather than sociological concept. Undoubtedly, a transfer decision requires application of a court's traditional judgment.[105] The criteria cited in the appendix to *Kent* include, for example, the protection of society.[106] But that is only part of the balancing of interests. The juvenile court is required to make the complex determination whether a juvenile is amenable to treatment. The case law generally indicates, however, a failure to evolve relevant standards to identify those who would respond to treatment.[107]

VI. THE STATEMENT OF REASONS

Just as the Court failed to make clear the substantive elements of amenability, it also failed to specify what constitutes an adequate statement of reasons. Confusion in this area, as in the "amenable to treatment" area, has led to a variety of ways in which the juvenile court avoids the due process protections in-

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society. This, in part, may account for some of the distrust between social scientists, lawyers, and judges. *See generally* Brennan & Khinduka, *Role Expectations of Social Workers and Lawyers in the Juvenile Court*, 17 CRIME & DELINQUENCY 191 (1971); Schultz, *The Adversary Process, the Juvenile Court and the Social Worker*, 36 U. MO.K.C. L. REV. 288 (1968). *But see* People v. Allgood, 54 Cal.App.3d 434, 447, 126 Cal. Rptr. 666, 674 (1976).

> Testimony of expert witnesses may also provide guidance for the court's decision on the fitness of a minor for treatment as a juvenile. . . . Since the dispositive question is the minor's amenability to treatment through the facilities available to the juvenile court, testimony of experts that the minor can be treated by those facilities is entitled to great weight in the court's ultimate decision.

105. *See, e.g.*, Kent v. United States, 383 U.S. at 552-53: "We agree with the Court of Appeals that the statute contemplates that the Juvenile Court should have considerable latitude within which to determine whether it should retain jurisdiction over a child . . . ."

106. 383 U.S. at 556. "1. The seriousness of the alleged offense to the community and whether the protection of the community requires waiver."

107. *See* notes 41-48 and accompanying text *supra*. For another thoughtful analysis of relevant criteria, see R.K.M. v. State, 535 S.W.2d 676 (Tex. Civ. App. 1976). Once a lower court considers such factors, however, *quaere* whether an appellate court will overturn the substantive finding of nonamenability. *See, e.g.*, People v. Allgood, 54 Cal. App. 3d 434, 126 Cal. Rptr. 666 (1976).

tended by *Kent*. A review of the cases indicates several factual situations in which that question arises: (1) when there is no statement of reasons of record, largely because no hearing was held at all; (2) when there is no statement of reasons, but the court has before it the record of the hearing conducted below; (3) when the statement of reasons is a rote recitation that the juvenile is amenable to treatment.

Lack of Hearing

Freeman Appeal[108] presents an instance of the first situation. Five juveniles filed petitions for writs of habeas corpus following their conviction in juvenile court on rape charges. After a hearing had begun, the petitions were dismissed and all appellants were certified to the district attorney for prosecution.[109]

In reversing the conviction, the Pennsylvania Superior Court emphasized that no hearing was held on the issue of certification.[110] Under such circumstances, several grounds for reversal existed. First, there was the failure of the court to provide a statement of reasons for its decision to waive jurisdiction.[111] In addition, there was a denial of rights guaranteed by *Gault* at the original delinquency hearing, and denial of effective assistance of counsel at the hearing.[112]

No Statement of Reasons

The second situation, when there is no statement of reasons, but the appellate court has before it a record of the proceedings, is more complex. Courts have divided on whether that situation can comport with the explicit requirement of *Kent* that a statement of reasons appear of record.[113] Several courts have noted

108. 212 Pa.Super. 422, 242 A.2d 903 (1968); *accord*, State v. Yard, 109 Ariz.App. 198, 507 P.2d 123 (1973); Summers v. State, 248 Ind. 534, 230 N.E.2d 324 (1967); Kline v. State, 86 Nev. 59, 464 P.2d 460 (1970); *In re* Mack, 22 Ohio App. 2d 201, 260 N.E.2d 619 (1970); Knott v. Langlos, 102 R.I. 517, 231 A.2d 767 (1967).

109. 212 Pa.Super. at 425, 24 A.2d at 905.

110. *Id.*

111. *Id.*

112. *Id.*

113. *See, e.g.*, Lujan v. District Court, 161 Mont. 287, 505 P.2d 896 (1973); State v. Madrigal, 85 N.M. 496, 513 P.2d 1278 (1973); State *ex rel.* Juvenile Dep't v. Slack, 17 Ore. 57, 520 P.2d 905 (1974); J.T.P. v. State, 544 P.2d 1270 (Okla. Crim. 1975); Kern v. State,

that in *Kent* there was no indication that the juvenile court held a hearing despite several motions by defense counsel.[114] The Oregon Court of Appeals in *State ex rel. Juvenile Department of Washington County v. Slack*[115] rejected the necessity for a statement of reasons because of the availability of *de novo* appellate review, because the Oregon statute does not require written findings, and because a juvenile court exercises jurisdiction as a court of general and equitable jurisdiction by statute, and appeal from its order is conducted in the same manner as an appeal in an equity suit.[116] The court explained that in Oregon, *de novo* review means review in the fullest sense.[117]

No such requirement of *de novo* review was mandated by the District of Columbia statutes, and thus, *Kent's* mandate that the court prepare a statement of reasons is inapplicable in Oregon. Despite superficial plausibility, the opinion does not consider the implications of the noted exception to *de novo* review.[118] If conflicting testimony appeared in the record, the only guarantee of meaningful review would be resort to findings by the lower court, hence reintroducing the necessity of the *Kent* procedures.

Numerous courts have rejected the opportunity to review the record without the lower court's statement of reasons.[119] At times,

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522 P.2d 644 (Okla.Crim. 1974); Sherfield v. State, 511 P.2d 598 (Okla. 1973); *In re* Burtts, 12 Wash.App. 564, 530 P.2d 209 (1975). *But see* R.J.C. v. State, 520 P.2d 806 (Alas. 1974); People v. Joe T., 48 Cal.App.3d 114, 121 Cal.Rptr. 329 (1975); Juan T. v. Superior Court, 49 Cal.App. 207, 122 Cal.Rptr. 405 (1975); *In re* Sturm, 11 Cal.3d 258, 521 P.2d 97, 113 Cal. Rptr. 361 (1974); Atkins v. State, 259 Ind. 596, 290 N.E.2d 441 (1972); State *ex rel.* T.J.H. v. Bills, 504 S.W.2d 76 (Mo. 1974); *In re* J.R.C., 522 S.W.2d 579 (Tex. Civ. App. 1975). The Kentucky courts initially rejected the position that a statement of reasons could appear in the record itself and required a formal statement. Baker v. Commonwealth, 500 S.W.2d 69 (Ky. 1973); Whitaker v. Commonwealth, 479 S.W.2d 592 (Ky. 1972). The Supreme Court of Kentucky recently decided that the statement may appear on the record. Hubbs v. Commonwealth, 511 S.W.2d 664 (Ky. 1974).

114. *See, e.g.*, Imel v. State, 342 N.E.2d 897 (Ind. App. 1976); State v. Highly, 195 Neb. 498, 238 N.W.2d 909 (1976); Kern v. State, 522 P.2d 644 (Okla.Crim. 1974); State v. Carmichael, 35 Ohio St.2d 1, 298 N.E.2d 568 (1973).

115. 17 Ore. 57, 520 P.2d 905 (1974).

116. *Id.* at 906.

117. *Id.* at 907, *citing* Hannan v. Good Samaritan Hospital, 471 P.2d 831, 835 (Ore.App. 1970).

118. *Id.* " 'This exception has been enunciated in terms of giving "great weight" to the tribunal . . . who had the opportunity to see and hear the witnesses and thus be better able to weigh their credibility on disputed issues of fact.' "

119. *See* note 113 *supra.* J.T.P. v. State, 544 P.2d 1270 (Okla. Crim. 1975) is an interest-

just as in *Kent*, the court has before it a record sufficient to determine several objective factors.[120] Nevertheless, in such instances, courts have generally remanded the case to the juvenile court for a reconsideration of its original order.[121] *State ex rel. T.J.H. v. Bills*[122] is representative of this approach. There the Missouri Supreme Court noted that a "reviewing court will not be permitted the assumption that a juvenile court which has not expressed the basis for the order of waiver had found the facts necessary to such a judgment . . . ."[123]

In *Juan T. v. Superior Court*[124] the California Court of Appeals also addressed this point and concluded that the statement of reasons "is no make-work device."[125] The court refused to affirm the lower court because absent a statement of reasons, the court could not determine whether the lower court as mandated by law had considered relevant variables, such as a minor's past record and behavior pattern described in the probation officer's report.[126]

Rote Recitation May Be Sufficient

The third situation arises when the juvenile court merely announces its conclusion that the juvenile is not amenable to treatment. For example, a lower court may state that " 'said child is

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ing case. The court remanded because the lower court made no finding on the prosecutive merits of the state's case. More commonly, the lower court fails to make a finding on the question of the juvenile's amenability to treatment. Because the appeal is from the judgment of sentence after the transfer, the appellate court can infer the prosecutive merit from the result of the trial.

120. These factors include the age of the juvenile, seriousness of the offense, prosecutive merit of the claim, *cf.* State *ex rel.* T.J.H. v. Bills, 504 S.W.2d 76 (Mo. 1974), prior contacts of the juvenile with the juvenile justice system, *see, e.g.*, Juan T. v. Superior Court, 49 Cal.App. 207, 122 Cal.Rptr. 405 (1975), and the existence of other, adult co-defendants. Welfare of J.F.C. v. State, 225 N.W.2d 245 (Minn. 1975). In addition, the court may also have available in the record psychiatric and psychological reports submitted to the lower court.

121. *See* note 12 *supra*.

122. 504 S.W.2d 76 (Mo. 1974). *But see* State v. Kemper, 535 S.W.2d 241 (Mo. App. 1976).

123. *Id.* at 82.

124. 49 Cal.App.3d 207, 122 Cal.Rptr. 405 (1975).

125. *Id.*

126. *Id. But see* People v. Allgood, 54 Cal. App. 3d 434, 126 Cal. Rptr. 666 (1976). Once the lower court provides an adequate statement of reasons, an appellate court is apparently hesitant to substitute its judgment for that of the lower court, acting on recommendation of an expert witness.

not a suitable candidate for the rehabilitation program of the juvenile court' and the finding is that it is in the best interest of the public that jurisdiction be waived."[127] The problem is whether such a rote recitation amounts to a finding of fact and a statement of reasons in support of the decision to waive jurisdiction over the juvenile.

This problem arose in *Commonwealth v. Greiner*.[128] The court simply stated that the juvenile

> is not amenable to treatment, supervision or rehabilitation through available facilities for juveniles . . . that the juvenile is not committable to an institution for mentally retarded or mentally ill; that the interests of the Community require that the juvenile be placed under legal restraint or discipline . . . .[129]

The crime involved was unquestionably serious and violent.[130] Under the Pennsylvania Juvenile Act,[131] however, the court must evaluate several factors in addition to the seriousness of the offense before it can waive jurisdiction over the juvenile. In fact, at the transfer hearing in *Greiner*, considerable evidence concerning the prospects of the youth's capacity for rehabilitation was presented: Greiner was only 15 years old, and therefore, would be subject to the jurisdiction of the juvenile court for six years;[132] a probation officer testified that appellant came from a good family, that he performed well academically, that he was in the top 20% of his ninth grade class, and that he had never been in trouble in school or with the police previously.[133] Nonetheless, the

127. B.P.W. v. State, 214 So.2d 365, 366-67 (Fla. 1968). *See also* J.E.M. v. State, 217 So.2d 135 (Fla. 1968). The current approach of the Florida court is unclear. W.B. v. State, 313 So.2d 711 (Fla. 1975), follows *B.P.W.* and *J.E.M.* Davis v. State, 297 So.2d 289 (Fla. 1974), holds that the statutory requirement of a finding on the issue of amenability to rehabilitation is merely directory and, therefore, no finding on the issue of the child's best interest is required at all.

128. 234 Pa.Super. 705 (abstract), 344 A.2d 915 (1975).

129. 344 A.2d at 921-22 (Hoffman, J., dissenting).

130. The juvenile, his 19 year old brother, and a friend of the brother, planned to kidnap a schoolmate. On their arrival, the juveniles found that the schoolmate was not at home. Therefore, they kidnapped the boy's father and subsequently beat and stabbed him. *Id.*

131. The Pennsylvania Juvenile Act, 11 PA. STAT. §50-325(a) (1972).

132. 344 A.2d at 921. The Pennsylvania statute provided that juvenile jurisdiction terminated at the juvenile's 21st birthday. 11 PA. STAT. §50-102 (1972).

133. 344 A.2d 915. The appellate court was denied one extremely relevant piece of data, the psychologist's report regarding capacity for rehabilitation. *Id.* at 924-25.

lower court found that the juvenile was not amenable to treatment.[134] A majority of the Pennsylvania Superior Court recognized that *Kent*, Pennsylvania decisions, and the Pennsylvania Juvenile Act mandated a finding of nonamenability to treatment.[135] The court held that the juvenile court's finding of nonamenability was a legally sufficient finding under *Kent*.[136]

Neither the majority nor any of the three dissenting judges addressed the substantive issue of whether, given the numerous factors which pointed towards rehabilitation, the lower court erred in its finding. The majority upheld the court's exercise of its discretion; both dissenting opinions would have remanded for the introduction of the evidence excluded at the hearing.

Statement of Reasons Can Protect a Juvenile Offender

The demand for a statement of reasons is not merely an academic one. It may be that an appellate court has limited ability to judge the merits of a particular transfer decision.[137] The use of psychological and psychiatric data creates a particular dilemma for the reviewing court. A *per se* rule that a juvenile court is bound by recommendations of expert witnesses would remove the decision from the legal system. At the same time, an appellate court is not likely to possess sufficient expertise to make the substantive judgment that a juvenile is capable of rehabilitation. Therefore, if the lower court rejects the expert's recommendation concerning the juvenile, it is unlikely that an appellate court could substitute its judgment.[138] Nonetheless, a statement of reasons does provide some protection for the juvenile offender.

Several cases indicate the importance of such a statement.[139] In *In re Barker*,[140] the juvenile court found that the minor needed

134. *Id.* at 922.

135. *Id.* at 917.

136. *Id.* at 918.

137. *See In re* Maricopa County, 18 Ariz.App. 560, 504 P.2d 501 (1972), on the complex balance which the court must strike between data from the social sciences and its own sense concerning the juvenile's likelihood of being treated.

138. *See generally* Hays & Solway, *The Role of Psychological Evaluation in Certification of Juveniles for Trial as Adults*, 9 HOUST. L. REV. 709 (1972). *Cf.* People v. Allgood, 54 Cal. App. 3d 434, 126 Cal. Rptr. 666 (1976).

139. *Cf.* Kent v. United States, 401 F.2d 408 (D.C. Cir. 1968); Juan T. v. Superior Court, 49 Cal. App. 207, 122 Cal. Rptr. 405 (1975).

140. 17 Md.App. 714, 305 A.2d 211 (1973).

extensive medical treatment in a residential setting.[141] Nevertheless, at the close of the waiver hearing, the juvenile court judge waived jurisdiction, reasoning that it could not be determined if treatment could be complete by the time the juvenile reached the age of 21, at which time the court would lose jurisdiction over the juvenile.[142]

The appellate court, after independently reviewing the psychological and psychiatric reports contained in the record, found insufficient evidence to justify the court's finding that treatment would extend beyond appellant's majority. The court stated "(I)n our view, the evidence in this record does not go beyond a bare showing of the possibility that effective treatment of the appellant might require his detention beyond his majority. That mere possibility is not enough to justify waiver on the facts of this case."[143]

Ingram v. State[144] is another example of meaningful inquiry by an appellate court through its review of the juvenile court's discussion of the transfer decision. By statute,[145] the Indiana legislature required an investigation of certain personal and social criteria before making a waiver decision. Because the lower court was required to state on the record its reasons for the waiver decision, the reviewing court could determine whether the lower court had complied with the state statute. The court's failure to conduct the required inquiry resulted in a defective waiver.[146]

Although an appellate court is not ideally suited to make the decision that a juvenile is not amenable to treatment, its vigorous review of a juvenile court's determination appears to have an ameliorative effect in preventing summary treatment of juveniles. Viewed in this light, one sees the inadequacy of a court's upholding a rote recitation that the juvenile court has found the juvenile is not amenable to treatment.

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141. *Id.* at 719, 305 A.2d at 214-15.
142. *Id.* at 719, 305 A.2d at 215.
143. *Id.* at 720, 305 A.2d at 216.
144. 310 N.E.2d 903 (Ind. App. 1974).
145. IND. ANN. STAT. §9-3208 (Supp. 1966).
146. 310 N.E.2d at 904.

VII. STATUTORY CIRCUMVENTION

By Redefinition

At the same time that courts have wrestled with the elusive protective concept of "amenability to treatment," legislators apparently have responded to the public outcry for harsher treatment for juvenile criminal offenders.[147] An example of this is the District of Columbia Court Reform and Criminal Procedure Act of 1970[148] which substantially revised the juvenile court procedure.[149] The *Kent* requirement of a full hearing prior to waiver was avoided for some offenders by redefining the term child. The new definition includes those persons under 16 years of age but excludes those who reach 16 years and are charged by the United States Attorney with murder, forcible rape, burglary in the first degree, armed robbery, or assault with attempt to commit any such offense.[150] In the absence of this automatic certification, the statute provides procedures whereby the juvenile may, on motion, be certified to adult court.[151]

The impetus for the new waiver standard was based on statistical information which indicated that certain violent crimes had increased dramatically between 1963 and 1969,[152] and that 61% of the cases referred to juvenile court in the third quarter of 1969 involved children previously referred to it.[153] Congress undoubtedly looked upon these figures as indicative of the confirmed nature of juvenile offenders as habitual criminals and as proof of their sophistication. Seventy-nine percent of that 61% were still under the court's jurisdiction when the second crime

147. *See* Darling, *Youthful Offenders and Neglected Children Under the District of Columbia Crime Act*, 20 AM. U. L. REV. 373 (1970-71).

One clear campaign against the treatment model of justice was ushered in by former President Nixon's early efforts aimed at"curbing crime and improving the conditions of life in the city of Washington." *Id.* at 373, *citing* 5 WEEKLY COMP. PRESIDENTIAL DOCS. 197 (Feb. 3, 1969).

148. D.C. CODE ANN. §16-2301 (1971).

149. *See generally* Lawton, *Juvenile Proceedings—The New Look*, 20 AM. U. L. REV. 342 (1970-71).

There is some indication in the statutory history that the legislation was intended to circumvent *Kent*. *Id.* at 353.

150. D.C. CODE ANN. §16-2301(3)(A) (Supp. IV, 1971).

151. *Id.* Lawton, *supra* note 149, at 359.

152. *Id.* at 347.

153. Darling, *supra* note 147, at 383.

took place.[154] Though cited as proof of sophistication, this statistic tells little about whether they committed serious offenses. That they were not being detained in a juvenile facility at the time of their repeated offenses, the nature of which is not analyzed in the Department's data, suggests that many of the recidivists were initially involved in trivial offenses.

Automatic certification in part avoids the problems raised by *Kent*.[155] A judge does not have to make the complex determination of amenability to treatment because the legislature has provided that the criminal court has original jurisdiction if the juvenile is charged with certain crimes. In fact, however, automatic certification places the transfer decision in one of the areas of law least subject to judicial review,[156] and thus invites arbitrary procedure and circumvention of the principles of juvenile justice. A district attorney is traditionally more likely than a judge to be responsive to political pressure, and thus more likely to seek transfer of jurisdiction in response to society's demand for retribution and to ignore the rehabilitative considerations upon which the juvenile justice system is premised. Further, as an adversary, a prosecutor is less likely than a judge to consider the welfare of the accused. Thus, Congress' decision to avoid the transfer procedure circumvents the holding of *Kent* that a decision of such tremendous consequences should not be rendered without ceremony.[157]

Because automatic certification forecloses review of the prosecutor's decision to charge the juvenile with a certain crime, two distinct but related questions are raised: (1) Does the procedure deny the juvenile due process in that there is no assurance that the prosecutor has conformed with the basic requirements of fairness that *Kent* suggests must be afforded juveniles? (2) Does the procedure create equal protection problems in that the prosecutor's decision to charge the juvenile with a specified crime is the basis for excluding the child from the care, rehabilitation, and shorter periods of incarceration that exist in the juvenile system?

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154. *Id.*

155. For a list of jurisdictions that employ some form of automatic certification, see United States v. Bland, 472 F.2d 1329, 1334 n.19 (D.C. Cir. 1972).

156. *See, e.g.*, Moses v. Kennedy, 219 F. Supp. 762 (D.D.C. 1963).

157. Kent v. United States, 383 U.S. at 554.

By Prosecutorial Discretion

Not only do statutory revisions restrict *Kent's* due process protections for juvenile offenders, but prosecutorial discretion, which may be nothing more than police discretion, limits *Kent's* application. If a criminal proceeding begins by information, no hearing is required.[158] If a criminal proceeding follows a grand jury indictment, there is serious doubt whether the defendant has received any protection from the zeal of the prosecutor and the police.[159] Even in jurisdictions where the defendant receives a preliminary hearing, several reasons exist for finding that the defendant is not fully protected. First, a magistrate has the assurance that if he errs in finding sufficient evidence to send a charge to trial, his judgment will be reviewed, but that if he dismisses a charge his decision is unlikely to be reviewed. It follows, therefore, that the threshold level of proof[160] and evidence[161] are quite low. Furthermore, defense counsel may be severely limited in scope of cross-examination or may strategically forego such cross-exam.[162]

Also, it is common knowledge that prosecutors often overcharge in a criminal complaint.[163] If charges are dismissed at the preliminary hearing stage, there are still adequate grounds on which to proceed. More importantly, multiple charges give the prosecutor further leverage in plea bargaining.[164]

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158. Lem Woon v. Oregon, 229 U.S. 586 (1913).

159. *See, e.g.*, Antell, *The Modern Grand Jury: Benighted Supergovernment*, 51 A.B.A.J. 153, 154 (1965): "It simply is not true that the grand jury system protects the individual from oppression; indeed it has far greater potential as an instrument of oppression." Morse, *A Survey of the Grand Jury System*, 10 ORE. L. REV. 101 (1931), suggests that grand juries disagreed with the prosecutor in only 5% of the cases presented to them. *See also* Whyte, *Is the Grand Jury Necessary?*, 45 VA. L. REV. 461 (1959).

160. For the low threshold of proof required under a probable cause standard, see Rideout v. Superior Court, 67 Cal.2d 471, 432 P.2d 197, 62 Cal.Rptr. 581 (1967). For comprehensive examination and critique of the inadequacy of probable cause and of a prima facie standard as evidentiary standards of proof at the preliminary hearing, see Myers v. Commonwealth, 363 Mass. 843, 298 N.E.2d 819 (1973).

161. *See, e.g.*, Coleman v. Burnett, 477 F.2d 1187 (D.C. Cir. 1973).

162. *See* dissenting opinion by Brennan, J., in California v. Green, 399 U.S. 149, 189 (1970).

163. *See, e.g.*, United States v. Maybury, 274 F.2d 899 (2d Cir. 1960) (Friendly, J.): "The vogue for repetitious multiple count indictments may well produce an increase in seemingly inconsistent jury verdicts, where in fact the jury is using its power to prevent punishment from getting too far out of line with the crime." *Id.* at 902.

164. *See* Newman, *Reshape the Deal*, 9 TRIAL, No. 3, 11-15 (1973).

In general, the broad discretion entrusted to the prosecution is not reviewable.[165] In *United States v. Bland*[166] the method by which the transfer decision was made was challenged, rather than the power of the United States Attorney to make the decision.[167] In dismissing the juvenile's argument, the court stated that this theory ignores the widely accepted concept of prosecutorial discretion which is derived from the constitutional doctrine of the separation of powers.[168] Only if exceptional circumstances, such as race, religion, or other arbitrary classifications, were found would a review of discretion be permitted.[169]

The court in *Bland* also considered the argument that the statute creating a special classification of juvenile, to be treated differently than others, violates equal protection.[170] In rejecting this argument, that court stated that because of the increase in serious crimes committed by juveniles over the age of sixteen, Congress had a valid justification for creating this classification.[171] The dissent, however, pointed out that despite the appearance of validity, the statute was merely an attempt to avoid the impact of *Kent*.[172] Nevertheless, the general rule is that an apparently

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165. Moses v. Kennedy, 219 F. Supp. 762 (D.D.C. 1963).

166. 472 F.2d 1329 (D.C. Cir. 1972).

167. *Id.* at 1338.

168. *Id.* at 1335.

169. *Id.* at 1336. *See also* Comment, *Youthful Offenders and Adult Courts: Prosecutorial Discretion vs. Juvenile Rights*, 121 U. PA. L. REV. 1184 (1973), where the author has analogized the situation presented in *Bland* to the interests of a welfare recipient:

> Just as *Kent* and *Gault* protect juvenile status from judicial divestment, the Supreme Court has explicitly held in Goldberg v. Kelly, 397 U.S. 254 (1970), that a welfare recipient has a property interest in continued benefits which so outweighs governmental interests in administrative efficiency that even a temporary suspension of benefits must comport with due process. A youth's interest in juvenile treatment—with its obviously significant implications for his liberty—is as much within the protection of the fifth and fourteenth amendments as is the welfare recipient's property interest in continued benefits.

Id. at 1190.

170. 472 F.2d at 1333-34.

171. *Id.*

172. *Id.* at 1341.

> The "substantial difficulties . . . under present law" to which the Committee coyly refers are, of course, none other than the constitutional rights explicated in the *Kent* decision. And the "better mechanism" which the Committee proposes is a system for running roughshod over those rights.

Id.

unconstitutional legislative motive to abrogate due process rights of juveniles does not invalidate a statute otherwise constitutional.[173]

An Increase in Prosecutorial Discretion

The principle upheld in *Bland* that some juveniles are not entitled to separate treatment has been used to justify another, slightly broader grant of prosecutorial discretion which denies a due process hearing in the original jurisdiction decision. The Illinois legislature provides that the state attorney general determines the court of original jurisdiction.[174] In the event that the juvenile court judge objects to a transfer, the matter is referred to the chief judge.[175] The Illinois Supreme Court, in upholding the statute and a long line of Illinois cases,[176] held that since there is no constitutional requirement to create a juvenile court, a due process hearing as prescribed in *Kent* is not required at the time of the attorney general's decision.[177]

In *United States ex rel. Bombacino v. Bensinger*,[178] the Seventh Circuit considered the constitutionality of the Illinois statute. In denying a petition for habeas corpus, the court noted authority for providing the prosecutor with complete discretion.[179] Under this view, unless the state elects to provide judicial participation in the transfer decision, procedural safeguards would not be constitutionally required. Absent such statutory authority, the relevant test was whether any fundamental unfairness appeared on

173. *Id.* at 1342.

174. ILL. REV. STAT. ch. 37, §702-7(3) (1967).

175. *Id.*

176. People v. Sprinkle, 56 Ill.2d 257, 307 N.E.2d 161 (1974); People v. Bombacino, 51 Ill.2d 17, 280 N.E.2d 697, *cert. denied*, 409 U.S. 912 (1972); People v. Lane, 28 Ill.App.3d 906, 330 N.E.2d 149 (5th Dist. 1975); People v. Rahn, 15 Ill.App.3d 170, 304 N.E.2d 161 (4th Dist. 1973); People v. Brookaw, 12 Ill.App.3d 221, 299 N.E.2d 20 (3d Dist. 1973).

177. People v. Bombacino, 51 Ill.2d at 17, 280 N.E.2d at 69.

178. 498 F.2d 875 (7th Cir. 1974) (Stevens, C.J.).

179. The court cited the following:

> The Court of Appeals for the Fourth Circuit, sitting *en banc*, concluded that confining the decision to transfer totally to the prosecutor's discretion did not violate the Due Process Clause. Cox v. United States, 473 F.2d 334 (4th Cir. 1973). In People v. Jiles, 43 Ill.2d 145, 251 N.E.2d 529, 531 (1969), Justice Schaefer expressed the same view . . . .

401 F.2d at 877.

the record. Also, a statement of reasons was not required because it would not serve any function in the prosecutor's decision.[180]

VIII. CONCLUSION

If Supreme Court decisions are to guide lower courts, not merely to resolve disputes between the parties before it, *Kent v. United States* has fallen short of meeting that goal. First, while *Kent* did mandate that constitutional procedural due process protections be met in a waiver decision, it left unsettled which substantive criteria were to be determinative in the statement of reasons.[181] Second, though courts have found the term "amenable to treatment" and "best interest," especially when incorporating the *Kent* criteria, sufficiently precise to guide juvenile courts, they have almost universally failed to delineate the meaning of the terms.[182] Instead, even when applying the *Kent* criteria, courts have relied almost exclusively on the seriousness of the crime[183] and the juvenile's prior contact with the juvenile court system,[184] or they apply arbitrarily non-*Kent* criteria of cost and availability of treatment or emancipation to the waiver decision.[185]

In addition to problems relating directly to ambiguity within the *Kent* decision, appellate courts have failed to effectuate the underlying juvenile policy of *Kent* in two critical ways. First, many courts have not demanded an adequate statement of reasons in support of the transfer decision, a specific requirement of *Kent*.[186] Second, courts have allowed prosecutorial discretion to limit *Kent* by originally assigning juvenile cases to adult court, bypassing the constitutional safeways of the waiver procedure

180. *Id.*

181. *See* notes 11-14 and accompanying text *supra*.

182. *See* notes 41-56 and accompanying text *supra*.

183. *See* notes 60-68 and accompanying text *supra*. *See also* Chicago Tribune, September 17, 1976 at 1, col. 1. Florida is trying a 12 year old boy for murder as an adult because its statute provides that minors will be tried in adult court where (1) the crime is of a severe nature and the juvenile is not amenable to treatment and, (2) the county grand jury returns an indictment.

184. *See* notes 71-75 and accompanying text *supra*.

185. *See* notes 77-97 and accompanying text *supra*.

186. *See* notes 108-26 and accompanying text *supra*. Also, rote recitation that a juvenile is not amenable to treatment has avoided that rationale of *Kent*. *See* notes 127-36 and accompanying text *supra*.

and by permitting lower standards of proof and evidence and less opportunity for cross-examination.[187] Finally, the uncertain mooring of *Kent* has permitted automatic certification by statute of sixteen-year-old juveniles who have committed serious crimes. This statutory circumvention of *Kent* creates a broad exception to *Kent*'s attempt to introduce meaningful review into the transfer decision.[188]

More importantly, courts have not addressed more complex questions. Are certain classes of offenders more or less amenable to treatment? Does seriousness of the offense correlate with the offender's capacity for treatment? What variables correlate with amenability to treatment? What percentage of the juvenile treatment facilities are rehabilitative? Questions such as these remain the province of social scientists; there is apparently less than complete communication between social scientists, judges and lawyers. Absent such inquiry, it is doubtful that *Kent* can have the full ameliorative effect on the juvenile justice system that was apparently intended.

187. *See* notes 158-77 and accompanying text *supra*.

188. *See* notes 147-57 and accompanying text *supra*.